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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ARNALDO MERCADO VALDIVIA,

Defendant and Appellant.

E045656

(Super.Ct.No. RIF125904)

OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks,  
Judge. Affirmed.

Alex B. Perez for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting, Eric A.  
Swenson and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

## 1. Introduction<sup>1</sup>

Defendant Arnaldo Mercado Valdivia was the driver during a gang-related shooting. A jury convicted defendant of four felonies with enhancements: second degree murder, two counts of attempted murder, and shooting at an occupied house. (§§ 186.22, subd. (b); 187, subd. (a); 246; 664; 12022.53, subds. (d) and (e).) The court sentenced defendant to a total prison sentence of 126 years to life.

Defendant appeals on the grounds of instructional error, ineffective assistance of counsel, and insufficient evidence for conviction on all counts. We affirm the judgment.

## 2. Facts

### a. Prosecution Evidence

On the evening of August 26, 2005, two boys, Mario Negrette and Francisco Barba, ages 13 and 12, were in the Negrette front yard with some friends. Three male African-Americans—Carl Pettigen, Andrew Harris, and Michael Swayne—approached Mario and asked to speak to his brother, Alex. When Mario went inside to get Alex, a white car cruised by the Negrette front yard. Pettigen recognized the driver, defendant, from a class at Norte Vista High School. Pettigen yelled, “Tight car,” intending a compliment. Someone, not the driver, yelled back, “Fuck you.” Pettigen and Harris removed their shirts, expecting a fight to ensue. Pettigen, Harris, and Swayne clenched their hands, or “knuckled up,” anticipating a fight.

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<sup>1</sup> All statutory references are to the Penal Code unless stated otherwise.

The white car made a U-turn and stopped outside the Negrette house. A rear passenger jumped out yelling “Fuck ABK” and began shooting a semi-automatic weapon repeatedly at the three Black men. ABK is a gang name, meaning “All Black Kings” or “All Black Killers.”

Mario and Barba sought protection, huddling next to a wooden fence. Barba felt the wood from the fence hitting the side of his face.

While Pettigen and Harris ran for cover inside the Negrette residence, Swayne was fatally shot in the driveway. The white car sped away.

The police located five .40-caliber casings at the scene. Two fresh bullet strikes were found on the fence. Another fresh strike was found on a neighbor’s house. A bullet struck an exterior wall of the Negrette house and lodged in the interior wall of the garage.

Defendant’s living quarters displayed gang graffiti—symbols, names, emblems, including “5150” and “Panic”—and gang-related paraphernalia. An empty magazine for a .40-caliber handgun was found in the attic crawlspace.

Richard Granillo confessed to the shooting. He left a voice message for the police, admitting “I killed a [B]lack person. Got me a nigger with a [.40-caliber] Glock. . . . I’m 17 years old, and I ain’t planning to turn myself in, so fuck you guys.” Granillo has “5150” tattooed on his forehead.

A police gang expert testified that the shooting was gang-related because the location was territory claimed by two rival gangs, 5150 and ABK. The shooter, an admitted 5150 gang member, yelled “Fuck ABK,” before shooting. Because of how gangs operate, it was reasonable to infer that defendant knew Granillo was armed.

Defendant's conduct in making the U-turn and driving closer to the three victims was designed to assist Granillo in the shooting. The shooting benefited the 5150 gang.

The expert also believed defendant was a member of the 5150 gang. Defendant drove the white car with two other gang members as passengers. The garage where he lived was attached to a house occupied by the leader of the 5150 gang. Defendant's living quarters displayed gang involvement. He admitted his gang moniker was "Panic."

#### b. Defense Evidence

The fourth passenger in the white car was Carlos Alcala, defendant's friend of several years. Alcala testified defendant was not a gang member. Alcala knew Granillo by his gang moniker, "Sicko." When Granillo asked to spend an evening with defendant and Alcala, they all picked up Christian Garcia and drove around looking for girls.

When they drove past the three Black men, the trio screamed at the car and made hand signs. Sicko responded, "Fuck that." The car made a U-turn and returned. The Black men approached the car, one of them putting his hand inside his waist, "like he ha[d] a gun or something." Sicko jumped out of the car and began shooting, at least five shots. Sicko threatened the others not to talk. After the shooting, defendant asked Alcala to come back to his house for a birthday party.

Defendant testified he knew and associated with gang members but he denied being a 5150 gang member. Granillo was his neighbor but defendant did not know he was carrying a gun until the shooting. Granillo ordered defendant to make the U-turn but defendant did not anticipate any violence. When defendant first talked to the police, he lied because he was afraid of Granillo's threats.

### 3. Discussion

Defendant argues the court should have given instructions sua sponte on self-defense or lesser offenses involving justifiable homicide or attempted voluntary manslaughter. Defendant's theory on appeal is the behavior of the three victims was threatening or menacing, justifying Granillo's attack. Of course, defendant ignores the undisputed evidence that the occupants of the white car, instead of departing the scene after the verbal exchange, made a U-turn and returned to provoke a confrontation with the trio. Furthermore, at trial, defendant did not claim Granillo acted in self-defense. Rather, defendant asserted he did not know Granillo was armed or that he intended to shoot the victims.

The instructions suggested by defendant would have been entirely inconsistent with defendant's theory of the case. (*People v. Elize* (1999) 71 Cal.App.4th 605, 611-612, 615.) Nor could it have been ineffective assistance of counsel to fail to request irrelevant instructions. Under these factual circumstances, substantial evidence did not support instruction on self-defense or on lesser offenses. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116; *People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Barton* (1995) 12 Cal.4th 186, 195, 201.)

In a related argument, defendant contends, if the jury had been instructed properly, there was not substantial evidence for his conviction. The evidence fully supported the jury finding that defendant knew Granillo was armed and defendant drove the white car so as to facilitate the shooting. No more favorable verdict was reasonably probable even

if the jury had received the omitted instructions. Any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

4. Disposition

We affirm the judgment.

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s/Gaut  
J.

We concur:

s/Ramirez  
P. J.

s/King  
J.